UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ELAINE KAUFMAN CULTURAL CENTER/
LUCY MOSES SCHOOL FOR MUSIC AND DANCE
Employer

and 02-RC-181017

ASSOCIATED MUSICIANS OF GREATER NEW YORK
LOCAL 802, AMERICAN FEDERATION OF MUSICIANS
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Decision and Order to Open Challenged Ballots is denied as it raises no substantial issues warranting review.[1]

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[1] We agree with the Regional Director that the challenged voter in question (Dr. Emily White) was eligible, although we rely on a different rationale. The parties' stipulated election agreement described eligible voters as accompanists who were "employed by the Employer *at* its facility located at 129 West 67th Street" (emphasis added) and who had performed unit work within the stipulation's defined eligibility period. Where a stipulated election agreement expresses the parties' intent in clear and unambiguous terms, the Board simply enforces the agreement, without considering extrinsic evidence of their intent or community of interest factors. *Desert Palace, Inc., d/b/a Caesars Tahoe*, 337 NLRB 1096 (2002). See also *St. Vincent Hospital, LLC*, 344 NLRB 586 (2005) (stipulated unit limited to specific employer facilities). Accordingly, like the Regional Director, we do not rely on evidence that Dr. White worked as an accompanist at the West 67th Street facility during periods outside the timeframe specified in the stipulated agreement. By contrast, we find that the Regional Director erroneously concluded that the parties did not "intend" to limit the unit to the West 67th Street facility. The stipulated agreement plainly limits the scope of the unit to that location. Accordingly, we do not rely on evidence that White was paid to accompany a student vocalist at *other* locations during the eligibility period. We nevertheless find that White was eligible because unrebutted evidence in the record shows that the Employer paid White to perform accompanist work during the eligibility period at the West 67th Street facility, including rehearsing with a student viola player there.

Our dissenting colleague would exclude White from the unit because, in his view, the parties' stipulation is unambiguously limited to "regular" full and part-time accompanists, and White was not regularly employed in the "accompanist" classification. But, as our colleague acknowledges, the stipulation further defines those eligible as "employees in the above unit who have performed accompanist services for the Employer for the period from September 2015 to the present." That additional language clearly indicates that the parties intended a broader reading of the stipulation to include any employee who performed accompanist services at the West 67th Street facility during the relevant time period. Our colleague nevertheless argues that this additional language supports his reading of the stipulation because it refers to accompanist work performed "for" the relevant period, not just "during," that time period. In his view, the word "for" indicates that the parties intended to include only those accompanists who worked throughout the relevant period. This interpretation of "for," however, is undermined by both the stipulation itself and by the parties' demonstrated application of it. Thus, as found by the Regional Director, the stipulation does not limit eligibility by hours worked, the number of performances, or the number of assignments. Not surprisingly, then, other employees were deemed eligible, and not challenged by the Employer, even though the record shows they performed accompanist work only a few times, or even only once, during the relevant period. Similarly, we reject our colleague's assertion that White should be excluded from the unit because she is employed as a music teacher and not as an "accompanist." As set forth above, the stipulation includes all employees who have "performed accompanist services" and the unit includes other teachers who also performed

MARK GASTON PEARCE, MEMBER

LAUREN McFERRAN, MEMBER

Dated, Washington, D.C., November 29, 2017.

Chairman Miscimarra, dissenting:

The question presented in this case is whether employee Emily White, who is employed by the Employer as a music teacher, was eligible to vote in a stipulated unit of regular-full time and part-time accompanist employees. The hearing officer found that the parties' stipulation unambiguously excluded White, while the Regional Director found that it unambiguously included her. The majority also finds the stipulation unambiguously includes White, though they give it a different interpretation than either the hearing officer or the Regional Director. For the reasons stated below, I believe that the stipulation unambiguously excludes White. Accordingly, I would grant review, reverse the Regional Director, and sustain the challenge to White's ballot.

The Employer offers classes in music, dance, and theater at its 129 West 67th Street and 122 Amsterdam Avenue facilities in New York City. Since 2002, the Union has represented a unit of teachers employed at those two facilities. In August 2016, the parties entered into a stipulated election agreement for a unit of "[a]ll regular-full time and part-time accompanist employees employed by the Employer at its facility located at 129 West 67th, [sic] Street, New York, New York." The stipulation also provided that "[t]hose eligible to vote in the election are employees in the above unit who have performed accompanist services for the Employer for the

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such services during the relevant timeframe. For those reasons, we reject our colleague's view that the stipulation unambiguously excluded White. We nevertheless note that, even if one were to conclude that the stipulation is ambiguous (given the divergent readings by us and our colleague), we would find that the just-mentioned evidence of the parties' application of the stipulation constitutes extrinsic evidence that supports including White in the unit.

Finally, given the parties' stipulated eligibility formula, we need not address the Employer's assertions that White must be excluded as a "casual" or "dual function" employee unlikely to share a community of interest with the rest of the unit. *Goucher College*, 364 NLRB No. 71, slip op. at 2 fn. 4 (2016).

period from September 2015 to the present [August 2016]." The mail ballot election was held between September 6 and 20, 2016, and the tally of ballots shows six votes for and six against representation, with White's challenged ballot being determinative.

As noted, White is employed by the Employer as a music teacher in the parties' teacher unit. She worked as an accompanist at the West 67th Street facility on at most one occasion between September 2015 and August 2016: while admitting that her memory was "fuzzy," she testified that she thought that the Employer paid her for 30 minutes of rehearsal time to accompany a student's performance at that location in October or November 2015.[1] White also acknowledged that the Employer has "staff accompanists," and that she is not a staff accompanist but instead occasionally steps in "to play for students, for a difficult piece, when an accompanist is not available."

In cases involving stipulated bargaining units, the Board resolves determinative ballot challenges by applying the three-prong test set forth in *Desert Palace, Inc., d/b/a Caesar's Tahoe*, 337 NLRB 1096 (2002). Under *Caesars Tahoe*, the Board first determines whether the stipulation is ambiguous. If not, the Board enforces the stipulation unless it is contrary to the Act

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[1] White testified regarding this assignment as follows:

> Q Did you perform any other accompanist services in 2015 and 2016 for your children or anyone else at Kaufman?
> A I played for my daughter once in a Sunday afternoon recital when she played a concerto as her teacher accompanist. And there was a half hour that I played for a viola student, but a thorny, difficult piece. She was playing at the LaGuardia concerto competition, LaGuardia High School concerto competition. We rehearsed once with her teacher at the Kaufman Center and I think the student kicked in a little money and I was paid for a half hour at the accompanist's rate, something like that. It's fuzzy.
> Q That was a Kaufman student?
> A That was a Young Artist Program student through the Lucy Moses School.
> Q How much were you paid?
> A Perhaps it was $28, up to $28.

or an established Board policy. If it is ambiguous, the Board seeks to determine the parties' intent through standard methods of contract interpretation. If the intent cannot be discerned, the Board determines the bargaining unit by employing its community-of-interest test. 337 NLRB at 1097. In this case, it is unnecessary to consider the parties' intent, or analyze White's community of interest, because the parties' stipulation unambiguously excludes her.

As noted above, the stipulation defines the unit as "[a]ll regular-full time and part-time accompanist employees employed by the Employer at its facility located at 129 West 67th, [sic] Street, New York, New York." I agree with my colleagues that this unit description unambiguously limits eligibility to employees who performed accompanist work *at* the Employer's 129 West 67th Street facility.[2] Standing alone, the unit description also clearly limits eligibility to persons employed as "accompanist employees" on a "regular full-time and part-time" basis. This limitation would clearly exclude White, since she was employed as a music teacher and did not regularly perform accompanist work at any location, much less at 129 West 67th Street.[3]

To be sure, the stipulation also includes the provision, which the majority terms an "eligibility formula," stating that "[t]hose eligible to vote in the election are employees in the

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[2] Accordingly, and contrary to the Regional Director, any accompanist work that White may have performed at other locations has no bearing on her eligibility.

[3] In this regard, I believe that the word "regular" modifies both "full-time" and "part-time," since an employee who works full-time for an employer is, by definition, a regular employee. A contrary reading of the stipulation, as including "regular" full-time accompanists and all part-time accompanists, regardless of the regularity of their employment as accompanists, is unreasonable because it would give no meaning to the word "regular" for the reasons stated above.

The majority states that "the Employer paid White to perform accompanist work during the eligibility period at the West 67th Street facility, including rehearsing with a student viola player there," but it is undisputed that she only performed paid accompanist work once at the 129 West 67th Street facility during the relevant period of time. This single instance of accompanist work plainly does not constitute "regular" performance of accompanist work, even assuming her vague testimony is sufficient to find that it occurred.

above unit who have performed accompanist services for the Employer for the period from September 2015 to the present [August 2016]." I do not believe that this provision detracts from the requirement of "regular" employment as an accompanist. To the contrary, its requirement that employees have performed accompanist services "*for* the period from September 2015 to the present," rather than "*during* the period from September 2015 to the present" reinforces the unit description's requirement of regular accompanist employment. If *any* amount of accompanist work during the stated period is sufficient, then this provision would nullify the unit description's requirement that the work be performed at the 129 West 67th Street facility, its requirement that eligible employees be employed as accompanist employees, and its requirement of regularity. Moreover, by its terms, this provision only enfranchises those employees "in the above unit" who perform accompanist services for the Employer for the stated time period, which indicates that it narrows voting eligibility rather than expands it. Taken as a whole, then, I believe that the parties' stipulation unambiguously excludes White.[4]

My colleagues read the parties' stipulation quite differently. They find that it includes all individuals who were employed by the Employer as accompanists "at" its 129 West 67th Street facility and who performed unit work "within" the stipulation's defined eligibility period. Based solely on White's "fuzzy" testimony that she performed accompanist work for 30 minutes in October or November 2015, the majority finds that White met this lenient standard and was therefore eligible. I respectfully disagree. As noted above, the interpretation advanced by the majority gives no meaning to the portions of the stipulation requiring "regular" employment as an accompanist. This interpretation contravenes the cardinal rule of contract interpretation that

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[4] Because both the unit description and the eligibility formula exclude White, this interpretation is consistent with the principle that "unit inclusion and voting eligibility are coterminous concepts." *Goucher College,* 364 NLRB No. 71, slip op. at 4 (2016) (Member Miscimarra, concurring).

"[e]ffect should be given, if possible, to every word, sentence, and clause in the contract. No words should be rejected as surplusage if any reasonable meaning can be found." Jay E. Grenig, Principles of Contract Interpretation: Interpreting Collective Bargaining Agreements, 16 Cap. U. L. Rev. 31, 41-42 (1986) (footnotes omitted) ("Because the parties' use of a word indicates they intended it to have some meaning, an interpretation which gives meaning to every part of the contract is preferred to one that gives no effect to one or more parts.").[5] The majority's interpretation also unreasonably re-writes the stipulation to enfranchise employees who performed accompanist work "within" the period "from September 2015 to the present," contrary to the parties' agreement that only those employees who performed unit work "*for* the period from September 2015 to the present" would be entitled to vote. Finally, the majority's interpretation takes no account of the stipulation's requirement that unit employees be employed as "accompanist employees," the evidence that the Employer employs individuals in the classification of "staff accompanist," and White's admission that she is not employed in that classification.[6]

Finding White ineligible is consistent with how the Board would treat her ballot under a community of interest analysis. See *Davison-Paxon Co.,* 185 NLRB 21 (1970) (limiting eligibility to employees who averaged four or more hours per week in the quarter prior to

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[5] See also *TRW, Inc. v. Andrews,* 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotations omitted).

[6] Under *Caesar's Tahoe,* supra, the Board will consider evidence of the parties' intent only if it first finds that the stipulation is ambiguous. Because the stipulation in this case is unambiguous, my colleagues err insofar as they rely on evidence that the Employer did not challenge other employees who, like White, were employed as teachers, or who performed accompanist work infrequently during the relevant period, to determine White's eligibility. See *Caesar's Tahoe,* 337 NLRB at 1099-1100 (evidence that employer included disputed employee on voter list was extrinsic evidence of parties' intent).

eligibility date). It also avoids the problem of allowing the determinative ballot in this election to be cast by an employee who, at most, has performed 30 minutes of unit work, based on admittedly "fuzzy" testimony. While the parties were free to stipulate to a unit that encompassed White despite these circumstances, there is no indication that they did so here. Accordingly, as to these matters, I respectfully dissent.

PHILIP A. MISCIMARRA, CHAIRMAN